

**IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

**BRIAN J. WELSH,**  
Plaintiff,

v.

**JOANNE M. WORTHY,**  
**PERSONAL REPRESENTATIVE**  
**OF THE ESTATE OF**  
**IRENE H. MCLANE,**  
Defendant.

C.A. No.: U408-03-461

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**Date Submitted: May 18, 2011**

**Date Decided: June 15, 2011**

**MEMORANDUM OPINION**

Trial in the above captioned matter took place on May 18, 2011 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence<sup>1</sup> and sworn testimony, the Court reserved decision. This is the Court's Final Decision and Order.

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<sup>1</sup> The Court received into evidence the following items: Plaintiff's Exhibit A (Seller's Disclosure of Real Property Condition Report with Sellers listed as John and Irene McLane for the property at 1908 Gheen Road, Wilmington, DE 19808 signed by Irene McLane and dated 3-12-06; Attached Addendum of Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards for Housing Sales signed by Irene McLane and dated 3-12-06 as well as signed by her Agent dated 3-19-06); Plaintiff's Exhibit B (Agreement of Sale/Delaware Residential Property Essential Terms dated 4-5-06 with Buyer listed as Brian J. Welsh and Sellers listed as John and Irene McLane for the property at 1908 Gheen Road, Wilmington, DE 19808 signed by Plaintiff dated 4-5-06 and signed by Irene McLane dated 4-6-06); Plaintiff's Exhibit C (Terminix Termite Baiting System Protection Plan with Purchaser listed as John McLane for the address of 1908 Gheen Road, Wilmington, DE 19808 with Description of Structure(s) covered as House/Garage dated 6-22-00; Inspection Graph with the name of John McLane and the address of 1908 Gheen Road, Wilmington, DE 19808; Terminix WDO Application Record for Customer John McLane at the address of 1908 Gheen Road, Wilmington, DE 19808 for a date of application as 6-22-00); Plaintiff's Exhibit D (Terminix Inspection Report for Real Estate Transfers dated 3-10-00 for 1908 Gheen Road, Wilmington, DE 19808); Plaintiff's Exhibit E (Terminix Inspection Graph for the Property dated 6-12-00 listing the Owner's Name as McLane); Plaintiff's Exhibit F (Register of Wills Statement of Claim filed by Counsel for Plaintiff against McLane's Estate dated 11-19-07 alleging claims against the estate for breach of contract, misrepresentation, fraud and violation of 6 Del. C. § 2572 ("Buyer Property Protection Act")); Defendant's Exhibit # 1 (Facsimile to Amy Welsh from Mike McCullough of Re/Max Sunvest Realty dated 4-6-06 which includes Plaintiff's Exhibit C (Terminix Termite Baiting System Protection Plan with Purchaser listed as John McLane for the address of 1908 Gheen Road, Wilmington, DE 19808 with Description of

## **I. Procedural Posture**

### **(i) The Complaint**

The matter is a breach of contract action brought by Plaintiff Brian J. Welsh (hereinafter "Welsh" or "Plaintiff") against Defendant Joanne M. Worthy (hereinafter "Worthy" or "Defendant"), Personal Representative of the Estate of Irene H. McLane (hereinafter "McLane") in connection with the sale of a home.

The Complaint alleges that on or about March 16, 2006, McLane signed a Seller's Disclosure of Real Property Condition Report (hereinafter "Seller's Disclosure") for her property located at 1908 Gheen Road, Wilmington, Delaware, 19808 (hereinafter "the Property" or "Residence"), that she intended to sell to Plaintiff.<sup>2</sup>

Plaintiff further alleges that the Seller's Disclosure provided the following: 1) in Section 8, Number 53, that there was or had been infestation by termites or other wood destroying insects; 2) in Section 8, Number 54, that there was not nor had been damage to the property caused by termites, other wood destroying insects, pests or dryrot; 3) in Section 8, Number 55, that the property was under warranty from Terminix, an exterminating company; and 4) in Section 8, Number 56 that there had been termite and/or pest control inspections or treatments for the property.

Plaintiff alleges that McLane acknowledged by signature that the information in the Seller's Disclosure was true and accurate and that she had no knowledge of any undisclosed defects or problems with the property. After receiving the signed Seller's Disclosure, on or about April 5, 2006, Plaintiff signed an Agreement of Sale Contract, for the purchase of real property at 1908 Gheen Road,

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Structure(s) covered as House/Garage dated 6-22-00; Inspection Graph with the name of John McLane and the address of 1908 Gheen Road, Wilmington, DE 19808; Terminix WDO Application Record for Customer John McLane at the address of 1908 Gheen Road, Wilmington, DE 19808 for a date of application as 6-22-00), Plaintiff's Exhibit B (Agreement of Sale/Delaware Residential Property Essential Terms dated 4-5-06 with Buyer listed as Brian J. Welsh and Sellers listed as John and Irene McLane for the property at 1908 Gheen Road, Wilmington, DE 19808 signed by Plaintiff dated 4-5-06 and signed by Irene McLane dated 4-6-06); Additionally included are the Terms and Conditions of the Agreement of Sale initialed on each page by the Seller and Buyer and a Buyer-Seller Dispute Resolution signed by Brian Welsh as Buyer and Irene McLane as Seller dated 4-5-06; Defendant's Exhibit # 2 ( Drawing with "X" marks where Plaintiff had indicated that the termites were found on the property).

<sup>2</sup> See Seller's Disclosure attached to Plaintiff's Complaint as Exhibit A.

Wilmington, Delaware 19808 from McLane.<sup>3</sup> On or about April 6, 2006, McLane signed the aforementioned Agreement of Sale. Plaintiff further alleges that Section 11 of the Agreement of Sale stated that "Seller to provide previously performed termite inspection."

On or about April 6, 2006, Plaintiff received from McLane or her agent a three-page Terminix document titled "Termite Baiting System Protection Plan" (hereinafter "the Plan") and dated June 22, 2000 and stating several times that "preventive" service was performed. In such document there is no mention of active infestation.<sup>4</sup>

On or about June 30, 2006, Plaintiff purchased the property from McLane. Approximately two weeks after the June 30, 2006 settlement on the Property purchase, Plaintiff discovered damage to several walls of a wing of the house that would be known as a "great room". Plaintiff then contacted Terminix in early July of 2006. A Terminix employee inspected the walls of the "great room" and informed Plaintiff that there was termite damage and active infestation of termites in said walls.

At that time, the Terminix employee provided Plaintiff with two (2) Terminix documents. One document was titled "Inspection Report" and was dated March 3, 2000, and the other document was titled "Inspection Graph" dated June 12, 2000 and was signed by John McLane, whom Plaintiff alleges was Irene H. McLane's husband at the time, now deceased. Plaintiff alleges that the two (2) Terminix documents were never provided to him by McLane or her agent.<sup>5</sup>

Plaintiff alleges that damage to the walls of the residence from the termites is estimated to be approximately \$11,000.00. Defendant is the personal representative of the Estate of McLane as McLane died on March 25, 2007. McLane's will was probated on May 10, 2007, and filed with the Office of the Register of Wills for New Castle County, Delaware, ROW File Number 140659. As

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<sup>3</sup> See Agreement of Sale attached to Plaintiff's Complaint as Exhibit B.

<sup>4</sup> See Termite Baiting System Protection Plan attached to Plaintiff's Complaint as Exhibit C.

<sup>5</sup> See Inspection Report and Inspection Graph attached to Plaintiff's Complaint as Exhibit E.

such, Plaintiff alleges that he timely presented his claim against McLane's estate by written statement delivered to Worthy as personal representative of McLane's estate under 12 *Del. C.* § 2104.<sup>6</sup>

Plaintiff further alleges that Worthy, as personal representative of the Estate of McLane, is liable to him for the property damage to the residence in that McLane: 1) committed fraud pursuant to the common law of the State of Delaware; 2) breached her duties under 6 *Del. C.* § 2572 ("Buyer Property Protection Act"); 3) breached the Contract of Sale for the Property; 4) made false statements in the Agreement of Sale in the disclosure which Plaintiff relied on to his detriment; 5) misrepresented the condition of the property and the history of the termite infestation and damage; and 6) was otherwise liable as discovery may reveal. As a result of McLane's actions, Welsh has sustained property damage of approximately \$11,000.00.

Plaintiff seeks judgment against Defendant for the total amount of damages sustained by Plaintiff, plus pre-judgment and post-judgment interest, general compensatory damages, punitive damages, costs, attorney fees and such further relief as the Court deems just.

**(ii) Defendant's Answer**

Defendant filed an Answer to Plaintiff's Complaint. In the Answer, Defendant admits that she is the personal representative of the Estate of McLane and that McLane died on March 25, 2007. Defendant admits that McLane's will was probated on May 10, 2007, and filed with the Office of the Register of Will for New Castle County, Delaware, ROW File Number 140659.

Defendant further admits that McLane signed the Seller's Disclosure of Real Property Condition Report for the property at 1908 Gheen Road, Wilmington, Delaware, 19808 on or about March 16, 2006; however, Defendant denies that McLane intended to sell the property to Welsh at the time that the Seller's Disclosure was signed. Defendant asserts that the Seller's Disclosure speaks for itself.

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<sup>6</sup> See Statement of Claim attached to Plaintiff's Complaint as Exhibit F.

Defendant admits, on information and belief, that McLane acknowledged by signature that the information in the Seller's Disclosure was true and accurate and that she had no knowledge of any undisclosed defects or problems with the property. Further, Defendant admits, upon information and belief, that Welsh executed an Agreement of Sale dated April 5, 2006 for the purchase of the residence from John and Irene McLane; however, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that Plaintiff received the Seller's Disclosure.

Defendant further admits, upon information and belief, that on or about April 6, 2006, McLane signed the Agreement of Sale. Defendant states that she is without knowledge or information sufficient to form a belief as to the truth that on or about April 6, 2006, Welsh received from McLane or her agent a three-page Terminix document titled "Termite Baiting System Protection Plan" dated June 22, 2000 which stated several times that "preventive" service was performed and that the document did not mention active infestation.

Defendant admits, upon information and belief, that on or about June 30, 2006, Welsh purchased the property from McLane. However, Defendant states that she is without knowledge or information sufficient to form a belief as to the truth of the following: 1) that approximately two (2) weeks after the June 30, 2006 settlement on the property purchase, Plaintiff discovered damage to several walls of a wing of the house that would be known as a "great room"; 2) that Plaintiff contacted Terminix in early July of 2006 and that a Terminix employee inspected the walls of the "great room" and informed Plaintiff that there was termite damage and active infestation of termites in the walls; and 3) that at that time, a Terminix employee provided Plaintiff with two (2) Terminix documents - one document titled "Inspection Report" dated March 3, 2000 and the other document titled "Inspection Graph" dated June 12, 2000, signed by John McLane, McLane's husband at the time, who is now deceased and that these two (2) Terminix documents were never provided to Plaintiff by McLane or her agent.

Defendant denies that damage to the walls from the termites is estimated to be approximately \$11,000.00. Defendant further denies that Plaintiff timely presented his claim against McLane's estate by written statement delivered to Defendant under 12 *Del. C.* § 2104.

Defendant denies that she is liable to Plaintiff for property damage to the residence in that McLane: 1) committed fraud pursuant to the common law of the State of Delaware; 2) breached her duties under 6 *Del. C.* § 2572 ("Buyer Property Protection Act"); 3) breached the Contract of Sale for the Property; 4) made false statements in the Agreement of Sale in the disclosure which Plaintiff relied on to his detriment; 5) misrepresented the condition of the property and the history of the termite infestation and damage; and 6) was otherwise liable as discovery may reveal. Finally, Defendant denies that as a result of McLane's actions, Welsh has sustained property damage of approximately \$11,000.00.

**(iii) Affirmative Defenses Raised by Defendant**

Defendant sets forth the following affirmative defenses in the Answer: 1) the Complaint fails to state a claim against Defendant upon which relief can be granted; 2) Plaintiff failed to arbitrate the matter in dispute in accord with the Buyer-Seller Dispute Resolution Agreement which was part of the Agreement of Sale between the parties; 3) Plaintiff has failed to plead fraud with particularity as required by Rule 9(b) of the Rules of the Court; 4) Plaintiff failed to file his Complaint within the time provided by 12 *Del. C.* § 2102(c); and 5) Plaintiff assumed the risk of problems with the property in that he obtained his own independent home inspection and termite inspection of the property or had the right to obtain said inspections and failed to do so.

Defendant seeks judgment against Plaintiff with costs to be paid by Plaintiff.

**II. The Facts**

Plaintiff Brian Welsh ("Welsh"), a graduate of Wilmington University and employed as an Investigative Services Officer for the State of Delaware in the Pre-Sentence Office since March of

2006, was the only fact witness to testify in this matter. Welsh had previously been employed by the Superior Court of Delaware for the past sixteen (16) years.

Welsh and his wife, Amie, a realtor and whom acted as the realtor in this matter, commenced their search for a home in mid to late March of 2006. Welsh toured the property at 1908 Gheen Road, Wilmington, DE 19808 with his wife. At that time, the residence was vacant and the owner was not present. Welsh recalled that the owner of the property in 2006 was McLane and that he did not know her and only spoke with her on the day of settlement for the purchase of the residence. Further, Welsh stated that Worthy is McLane's daughter, whom he has never spoke with nor was ever present at any time during the purchase of the residence.

Welsh testified that he did not obtain an independent termite inspection of the property because all the reports<sup>7</sup> that had been produced prior to sale indicated that there was no termite infestation. Specifically, Welsh indicated that the Seller's Disclosure indicated that the property was under contract with Terminix and for this reason he did not have a separate pest inspection completed. However, Welsh conceded the following regarding the Seller's Disclosure: 1) that Section 53 of the Seller's Disclosure did in fact disclose the existence of termite infestation; 2) that Section 54 indicated that there was no termite damage to the property; and 3) that there have been termite inspection or treatments for the property.<sup>8</sup>

Welsh stated that he relied upon two (2) reports that McLane produced prior to the sale of the property which indicated preventive treatment for termite infestation and that these two (2) documents produced, the Terminix Termite Baiting System Protection Plan dated June 22, 2000 and the Terminix WDO Application Record dated October 22, 2000 indicated no active infestation of termites on the property.<sup>9</sup> The reports, included with the Seller's Disclosure, were received by Welsh prior to

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<sup>7</sup> See Plaintiff's Exhibit A.

<sup>8</sup> See Plaintiff's Exhibit A and Defendant's Exhibit # 1.

<sup>9</sup> See Plaintiff's Exhibit C.

settlement.<sup>10</sup> Welsh indicated that the Inspection Graph revealed that bait stations had been placed around the residence and that when he observed one such bait station, the cap had nothing on it. Further, Welsh acknowledged that the bait stations were visible and that he observed them prior to the purchase of the home. Welsh stated that bait stations were monitoring devices and that thirty-five (35) stations had been placed in the residence for preventive treatment. However, Welsh did not know what the "circled numbers" on the Inspection Graph represented and conceded that he did not bother to inquire regarding such.

Thus, based upon the reports produced to him, Welsh felt comfortable purchasing the home. Welsh was aware at the time that he purchased the residence that the home was older and required work to be performed to it.

Shortly after he purchased the residence, Welsh sought to add an addition to the home. In furtherance of such, he commenced removal of the paneling and outlet switches specifically in one (1) room. In the process of doing so, he discovered that the walls had been "eaten away" by what appeared to him to be termite damage. Welsh additionally testified that he followed up after observing active infestation.

At that point, Welsh contacted McLane's realtor. He recalled that he did not speak with the owner but he did not recall whether he received correspondence back from the realtor or the seller.

Welsh also contacted Terminix requesting that the property be inspected since the property was still under contract with Terminix. Welsh informed Terminix that he had previously obtained reports from the Seller that indicated that preventive treatment had been performed on the property.

As a result, Terminix came to the property and installed bait stations<sup>11</sup> for approximately one (1) year. Welsh received reports from Terminix in July and August of 2006 regarding prior treatment to the property before his purchase of the property. Welsh indicated that he had not previously received

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<sup>10</sup> See Defendant's Exhibit # 1.

<sup>11</sup> Plaintiff described a bait station as a process where Terminix created a hole in the ground and inserted a cup-like device in order to catch the termites.



such reports from McLane. According to Welsh, the additional reports indicated that there had been termites in the mulch bed behind the residence in March of 2000<sup>12</sup> as well as swarmers and termites around the outside of the home in June of 2000.<sup>13</sup>

Terminix visited the property on a monthly basis and at the conclusion of such time, no termites were found. Welsh testified that no live insects or active termite infestation were/was found as a result of the inspection but rather only damage discovered. Welsh did not recall whether Terminix provided any treatment beyond the bait stations.

Welsh then decided to obtain an estimate in order to repair the damage. According to Welsh, on two (2) of the walls, the 2x4 wood beams were disintegrated to the point of resembling cardboard and did not appear structurally sound to him. He obtained an estimate from RD Arnold, which is a contracting company that Welsh's friend's stepfather owns.

Welsh was present when Greg Fletcher from RD Arnold visited the property in 2006. According to Welsh, Greg Fletcher poked around in the wall and took measurements. Welsh received an estimate for repair from RD Arnold a few weeks thereafter in the amount of \$11,000.00.

Welsh received a second estimate to repair the damage from Joe Rothmatter whom he discovered while looking through the telephone book for a contractor. According to Welsh, Joe Rothmatter visited the property in April of 2011 and inspected the walls. Welsh received an estimate from Joe Rothmatter in the amount of \$14,000.00 via mail.

Welsh testified that if had received additional reports<sup>14</sup> at the same time that he received the Seller's Disclosure he would have proceeded to sale in a different manner, specifically that he would have offered less of an amount for the sale or even not purchased the property. Welsh indicated that he "took it on face value" that no termite damage existed on the property. Welsh stated that he asked for all reports related to termites and all that he received was the Seller's Disclosure accompanied by the

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<sup>12</sup> See Plaintiff's Exhibit D (Terminix Inspection Report dated 3-10-00).

<sup>13</sup> See Plaintiff's Exhibit E (Terminix Inspection Graph dated 6-12-00).

<sup>14</sup> See Plaintiff's Exhibits D and E.

two (2) Terminix documents.<sup>15</sup> According to Welsh, the production of all reports related to termites in the residence was a condition of the contract specifically that all termite reports indicating active and/or prior infestation were to be provided to him.

Welsh did not direct the Home Inspector to focus upon any specific area. Further, had he been provided with the additional reports prior to sale then he would have instructed his Home Inspector to concentrate on specific areas. Welsh indicated that his Home Inspector, Amerispect did not discover any termite damage, though Welsh did not know if the Home Inspector removed any paneling or outlet covers in the residence at the time of inspection. Welsh initially became aware of the damage when he removed the paneling from the wall during renovation to the residence.

### **III. The Parties' Contentions**

#### **a. Plaintiff's Contentions**

Plaintiff asserts that the instant action is for breach of contract in relation to the sale of a home. The Seller's Disclosure provided that all reports related to termites were to be included and that Defendant only produced reports of preventive measures taken for termite infestation.

Plaintiff argues that the Sellers of the residence, Irene and John McLane whom are now deceased, were furnished with reports regarding termite infestation that they failed to produce to him. Further, Plaintiff argues that he contracted with the Sellers to purchase the home on the condition that all reports related to termites would be released to him as they would be crucial in his decision to purchase the home. Moreover, according to Plaintiff, a reasonable buyer would consider termite infestation and/or damage to the property caused by termites to be a major defect to the property.

Plaintiff contends that the additional reports that he received regarding termites originated with Terminix, not the Sellers, though the reports were addressed to the Sellers. Plaintiff argues that due to

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<sup>15</sup> See Defendant's Exhibit # 1.

negligence, fraud or misrepresentation on the part of the Sellers, all reports related to the property were not produced to him by the Sellers.

Further, Plaintiff argues that due to mistake, negligence or intentional concealment the failure of full disclosure by the Sellers rendered the effect of deception and that all reports should have been disclosed to him by the Sellers.

**b. Defendant's Contentions**

Defendant argues that the Sellers provided full disclosure to Plaintiff, in that they provided prior inspection reports and disclosed that the property was under treatment for termites. Further, Plaintiff argues that Buyer's own Home Inspector failed to discover any problem with termite infestation or damage caused by termites.

Defendant's position is that the Sellers made full disclosure and provided written documentation to Plaintiff and that Plaintiff has failed to provide any proof that the Sellers failed to disclose information or intentionally deceived Plaintiff. Further, Defendant points out that Plaintiff's wife is a realtor who acted in such capacity during the transaction.

Finally, Defendant argues that Plaintiff have not proved damages sufficient to justify an award of relief in his favor.

**c. Plaintiff's Additional Contentions**

Based upon Defendant's contentions, Plaintiff argues that the Sellers provided only partial disclosure to him and that limited disclosure was designed to deceive him regarding the true and full nature of the property. Plaintiff relied upon a condition of the contract that Sellers were to provide all reports related to the property and alleges that the Sellers never turned certain reports over to him. Further, it is the Sellers who bear the burden of full and complete disclosure.

Plaintiff argues that he has sustained his burden of proving damages as he received two (2) estimates from two (2) different contractors and that those estimates revealed damage to the wood beams of the residence therefore affecting the structural soundness of the home.

#### **IV. The Law**

In a civil claim for breach of contract, the burden of proof is on the Plaintiff to prove his claim by a preponderance of the evidence.<sup>16</sup> The plaintiff in a civil suit is required to prove all the elements of his or her claim by a preponderance of the evidence.<sup>17</sup> "Preponderance of the evidence" is defined as "the weight of evidence under all the facts and circumstances proved before you."<sup>18</sup> Or, put somewhat differently, "[t]he side on which the preponderance of the evidence exists is the side on which the greater weight of the evidence is found."<sup>19</sup>

To recover on a claim for breach of contract, the plaintiff must establish three elements by a preponderance of the evidence: (1) the existence of a contract, whether express or implied; (2) the breach of an obligation imposed by the contract; and (3) resultant damages to the plaintiff.<sup>20</sup> Stated differently, to state a claim for breach of contract, the Plaintiff must establish the following: (1) a contract existed; (2) the defendant breached the contractual obligations; and (3) the breach resulted in damage to the plaintiff.<sup>21</sup> Further, "when there is a written contract, the plain language of a contract will be given its plain meaning."<sup>22</sup>

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<sup>16</sup> *Williams v. Vertical Blind Factory*, 2009 WL 5604428 at \*3 (Del. Com. Pl. Nov. 17, 2009) citing *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. Ct. 2005).

<sup>17</sup> *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at \*3 (Del. Com. Pl. May 19, 2009) citing *Neilson Business Equipment Center, Inc. v. Monteleone*, 524 A.2d 1172 (Del. Super. Ct. 1987).

<sup>18</sup> *Id.* citing *Warwick v. Addicks*, 157 A. 205, 206 (Del. Super. Ct. 1931).

<sup>19</sup> *Id.* citing *Reynolds v. Reynolds*, 237 A.2d 708 (Del. Super. Ct. 1967).

<sup>20</sup> *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at \*3 (Del. Com. Pl. May 19, 2009) citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

<sup>21</sup> *Williams v. Vertical Blind Factory*, 2009 WL 5604428 at \*3 (Del. Com. Pl. Nov. 17, 2009) citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

<sup>22</sup> *Wilson v. Klabe Construction Co.*, 2003 WL 22931390 at \*4 (Del. Com. Pl. July 22, 2003) citing *Phillips Home Builders v. The Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. Super. Ct. 1997).

If a contract is clear on its face “...extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.”<sup>23</sup> In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract.<sup>24</sup> Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred.<sup>25</sup> Plaintiff, however, has a responsibility of proving damages as an essential element of his claim by a preponderance of the evidence.<sup>26</sup> At the same time, however, a party has a duty to mitigate once a material breach of contract occurs.<sup>27</sup>

A “good faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement is considered complete if the substantial purpose of the contract is accomplished.”<sup>28</sup>

The Seller’s Disclosure Report, signed by the buyer and the seller, becomes part of the purchase agreement.<sup>29</sup> Further, Plaintiff can show the breach of an existing contractual duty and resulting damages by pointing to representations made in the Seller’s Disclosure.<sup>30</sup>

“The Buyer Property Protection Act requires that any person transferring residential real property ‘disclose, in writing, to the buyer, agent and subagent, as applicable, all material defects of that property that are known at the time the property is offered for sale or that are known prior to the time

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<sup>23</sup> *Pro Fuels, Inc. v. Silver Spring Apartments, Inc.*, 2006 WL 4128769 at \*2 (Del. Com. Pl. Dec. 21, 2006) citing *N&P Partners, LLC v. Council of Unit Owners of Bayberry Woods Condominium*, 2006 LEXIS 38 at \*17, 2006 WL 456781 (Del. Ch. 2006) (internal citations omitted).

<sup>24</sup> *Marcano v. Dendy*, 2007 WL 1493792 at \*6 (Del. Com. Pl. May 22, 2007) citing *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, 251 A.2d 571, 573 (Del. Super. Ct. 1969).

<sup>25</sup> *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at \*3 (Del. Com. Pl. May 19, 2009) citing *Delaware Limousine Services, Inc. v. Royal Limousine Svc., Inc.*, 1991 LEXIS 130 at \*8 (Del. Super. Ct. Apr. 5, 1991).

<sup>26</sup> *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at \*3 (Del. Com. Pl. May 19, 2009).

<sup>27</sup> *Marcano v. Dendy*, 2007 WL 1493792 at \*6 (Del. Com. Pl. May 22, 2007) citing *Lowe v. Bennett*, 1994 WL 750378 at \*4 (Del. Super. Ct. Dec. 29, 1994).

<sup>28</sup> *Marcano v. Dendy*, 2007 WL 1493792 at \*6 (Del. Com. Pl. May 22, 2007) citing *Del. Civ. Pattern Jury Instructions* § 19.18 (1998).

<sup>29</sup> *Iacono v. Barici*, 2006 WL 3844208 at \*2 (Del. Super. Ct. Dec. 29, 2006) citing 6 *Del. C.* § 2573.

<sup>30</sup> *Id.*

of final settlement.”<sup>31</sup> “The disclosure is to be executed with a ‘good faith effort’ by the seller and is part of the sales contract.”<sup>32</sup> “By requiring a ‘good faith effort’ to disclose material defects, the maxim of caveat emptor, ‘let the buyer beware’ is effectively eliminated.”<sup>33</sup> Further, “the language of the Buyer Property Protection Act creates a statutory duty of disclosure which may form the basis of a breach of contract claim.”<sup>34</sup>

Regarding the issue of fraud, this Court in *Snow v. Opal*<sup>35</sup> stated:

At common law, fraud consists of: (1) a false representation, usually one of fact, made by the defendant; (2) the defendant’s knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff’s action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance.<sup>36</sup> Fraud may arise from overt misrepresentations, through deliberate concealment of material facts, or by silence when there exists a duty to speak. One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability for pecuniary loss as though he has stated the nonexistence of the matter that the other was prevented from discovering.<sup>37</sup>

## **V. Discussion**

There is no dispute that the parties entered into a contract for the sale of the property. There is also no question that the contract between the parties was executed and the real estate changed hands.

The issues pending before this Court in regard to the breach of contract is whether Defendant breached the contract by failing to disclose a prior and/or active termite infestation and whether Plaintiff has proved his claim by a preponderance of the evidence. The Court finds it must answer these questions in the negative.

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<sup>31</sup> *Id.* at \*4 citing 6 Del. C. § 2572.

<sup>32</sup> *Id.* citing 6 Del. C. §§ 2573-2574.

<sup>33</sup> *Id.* citing *Snow v. Opal*, 2002 WL 32000658 (Del. Com. Pl. May 20, 2002).

<sup>34</sup> *Id.* citing *See Gutridge v. Ifland*, 2005 Del. LEXIS 518, 889 A.2d 283 (Del. Super. Ct.)(Del. 2005).

<sup>35</sup> *Snow v. Opal*, 2002 WL 32000658 (Del. Com. Pl. May 20, 2002).

<sup>36</sup> *Id.* at \*4 citing *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

<sup>37</sup> *Id.* citing *Lock v. Schreppler*, 426 A.2d 856, 860-61 (Del. Super. Ct. 1981) (quoting *Restatement (Second) of Torts* § 550 (1976)).

The Court concludes that the Seller made the appropriate disclosure to the Buyer through the production of written documents provided to Plaintiff. The Agreement of Sale for the property states that the Seller is to "provide previously performed termite inspection." The Seller provided to Plaintiff documentation of inspection for termites and previously performed preventive treatment for termites.

Specifically, the Seller provided to Plaintiff the following documentation: 1) Terminix Termite Baiting System Protection Plan; 2) Terminix Inspection Graph; and 3) Terminix WDO Application Record. Plaintiff hinges his cause of action upon two (2) Terminix documents he alleges that McLane never provided to him. It is noteworthy that the two (2) documents alleged to have never been received by Plaintiff from McLane are unsigned documents though McLane is listed as the customer on the documents.<sup>38</sup> Plaintiff failed to demonstrate that these documents were in the possession of McLane and not simply in the files of Terminix.

However, the law of contracts does not require absolute compliance but rather requires a material breach of the contract. The two (2) documents alleged to have been concealed from Plaintiff do not constitute a material breach. Plaintiff was put on notice initially through the Seller's Disclosure as the Seller's Disclosure indicates that there is or had been termite infestation on the property. Further, the Seller's Disclosure also indicated that the property was under treatment with Terminix for termites. Plaintiff then received documentation indicating treatment for the property by Terminix. Thus, Plaintiff, from the outset of receipt of the Seller's Disclosure was aware of the possible current or prior presence of termites.

Plaintiff then obtained his own Home Inspection which revealed neither termites nor any damage caused by termites. At the time of the Home Inspection, Plaintiff was aware of the prior preventive treatment for termites as well as a current or prior termite infestation.

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<sup>38</sup> See Plaintiff's Exhibit D (where no signature appears) and Plaintiff's Exhibit E (where an illegible signature appears).

Plaintiff argues that had he provided the additional two (2) Terminix reports he would have instructed the Home Inspector to concentrate upon specific areas of the property but Plaintiff ignores the fact that he already possessed knowledge of current and/or prior termite infestation and treatment by Terminix from the Seller's Disclosure.

Further, the Agreement of Sale provided a Property Inspection Contingency which provided that if after Plaintiff's Home Inspection he had the opportunity to produce to the Seller a Report of Defects as well as a Request for Repair of such defects. If Plaintiff failed to take advantage of that contract provision, then the Seller is not obligated to repair the defects as per the contract.

The Agreement of Sale further included a provision entitled "Wood Destroying Insect Inspection"<sup>39</sup> wherein the Buyer must procure, at Buyer's expense, a wood destroying insect inspection report from a licensed company or individual. The provision further provides that the inspection must cover the house, attached or detached garage and improvements attached to the house or garage. According to the provision, the report must include evidence of inspection for termites. The provision additionally provides available remedies should active infestation, prior infestation and/or damage from infestation be discovered. The provision states that should the provision apply, Buyer purchases the property in "as is" condition and waives all claims under the provision against the Seller, for any damage to the structure by wood destroying insects.

There is simply no evidence that McLane failed to disclose any material fact regarding the prior or current presence of termites on the property, therefore the Court concludes that there was no breach of contract by the Seller.

There is also not a scintilla of evidence to demonstrate that McLane intentionally misrepresented any material fact regarding the presence of termites and damage caused by termites or that she committed fraud in any sense. Further, the Court finds no violation of 6 *Del. C.* § 2572 ("Buyer

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<sup>39</sup> See Defendant's Exhibit # 1, Provision # 17.



Property Protection Act”) nor does the Court find any evidence through the testimony and documentary evidence to support Plaintiff’s claim that McLane made false statements in the Seller’s Disclosure.

The Seller provided previous inspection reports regarding preventive treatment for the infestation of termites. Further, the Seller disclosed to Plaintiff that the property was under warranty by Terminix and had been treated for termites by Terminix. Buyer’s Home Inspector did not discover any problem with termites or any damage as a result of termites. The Inspection Graph<sup>40</sup> provided to Plaintiff by McLane and received by Plaintiff shortly after executing the Agreement of Sale indicates existing damage around Numbers 23, 24, 25 and 26 as these numbers are circled on the graph where circling depicts existing damage, specifically in the document it states “Circled symbol represents damage from this pest.” Further, the Inspection Graph states the Inspector’s statement of visible damage as preventive.

As an aside, Plaintiff failed to even connect Defendant with the instant cause of action in order to establish potential liability. Welsh testified that Defendant is McLane’s daughter whom he has never spoken with or even met or seen during the course of the real estate transaction. Plaintiff never presented Defendant as a witness to verify that fact at trial.

The dispositive issue in this matter is that Plaintiff has failed to prove damages as a result of an alleged breach of contract. Even assuming *arguendo* that Plaintiff did satisfy the burden of proving breach of contract, the cause of action cannot proceed because Plaintiff failed to prove damages in the matter. Welsh provided brief oral testimony as to his extent damages, specifically testimony related to the price of the estimates that he received to repair the property from two (2) third-parties. The two (2) contractors that Welsh received estimates from to repair the property were not offered as witnesses during trial, therefore there was no expert witness presented at trial to offer evidence as to damages.

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<sup>40</sup> See Plaintiff’s Exhibit C.

Welsh failed to present testimony from the contractors that he received estimates from to repair the property at trial, thus there was no witness at trial that the Court could deem as an expert witness. The testimony of Welsh was lay witness testimony under *Delaware Uniform Rules of Evidence 701*<sup>41</sup>, specifically lay witness testimony as to his perception.

Welsh provided to the Court brief oral testimony as to the cost to repair the property. However, his testimony did not constitute proof of actual, sustained damage to the property. He did not specify the damage and extent of such or the course of repair for the property.

Proof of damages is an essential element for a breach of contract claim and in this instance, Plaintiff has failed to plead damages. Plaintiff failed to present any expert witness or expert report to support his claim for damages.

Plaintiff did not present the contractor(s) as a witness(es) at trial whom he received estimates from to repair the property nor did he present any documents from said contractors to support the claim for damages. Further, Plaintiff did not present an itemization of the alleged damages. Plaintiff did not testify with any specificity as to the actual damages or the extent of such damages that he sustained nor did he testify in length as to cost to repair such damage.

Plaintiff was unsuccessful in the attempt to introduce into evidence the written estimates that he received from the contractors to repair the alleged damage for his failure to present the witnesses necessary to authenticate said documents. The written estimates of the contractors and their testimony concerning such would have been crucial to Plaintiff's claim. Without proper authentication of the written estimates, Plaintiff was unable to introduce these critical reports into evidence for the Court to consider as there was simply no proponent present to admit these documents.

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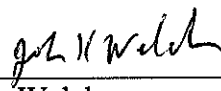
<sup>41</sup> *Delaware Uniform Rules of Evidence Rule 701* governs opinion testimony by lay witness and provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."

In conclusion, Plaintiff has failed to carry his burden and prove the claim for breach of contract by a preponderance of the evidence.

**VI. Opinion and Order**

Plaintiff has failed to prove the claim for breach of contract by a preponderance of the evidence primarily due to the failure to prove an essential element of said claim - damages for breach of contract. Based upon the foregoing reasons and analysis discussed *supra*, the Court finds in favor of Defendant Joanne M. Worthy as Personal Representative of the Estate of Irene H. McLane and against Plaintiff Brian J. Welsh as to liability and in the amount of no sum certain. Each party shall bear their own costs.

**IT IS SO ORDERED** this 15<sup>th</sup> day of June 2011.

  
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John K. Welch  
Judge

Cc: Ms. Tamu White, CCP Case Supervisor, Civil Division